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In the
Supreme Court of the United States
October Term, 1951

Boeing Airplane Company, a corporation, *Petitioner*,

vs.

Aeronautical Industrial District Lodge No. 751 of the International Association of Machinists, a labor organization; and International Association of Machinists, a labor organization, *Respondents*.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals for the Ninth Circuit

—and—

BRIEF IN SUPPORT OF PETITION

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The Argus Press, Seattle

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PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals for the Ninth Circuit

Boeing Airplane Company, a corporation, petitioner, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled case on March 27, 1951 (R. 1350) which affirmed the judgment of the United States District Court for the Western District of Washington, Northern Division (R. 694) dismissing this action before trial upon granting respondents' motions for summary judgment.

STATEMENT

This is an action based on a written contract between an employer and labor organizations to recover damages in the sum of about $9,000,000 for violation of the no-strike provision of such contract.

The petitioner, Boeing Airplane Company, will be referred to as "Boeing"; respondent Aeronautical Industrial District Lodge No. 751 of the International Association of Machinists will be referred to as "Lodge 751"; and the respondent International Association of Machinists will be referred to as the "International".

On January 4, 1944, an agreement was entered into and executed by Boeing's predecessor, Boeing Aircraft Company, on the one hand and Lodge 751 and the International on the other, which agreement, for the length of time specified therein, determined and designated the contractual obligations of that company as to the wages, hours and working conditions of the production and certain other employees of the company at its aircraft manufacturing plant and operations in Seattle and elsewhere in the State of Washington; and also determined and designated the contractual obligations of Lodge 751 and the International, and the employees covered by such agreement, to that company (R. 61, 63-121, 122, 129-130, 132).

All three parties joined in amending the agreement from time to time, the principal amendments having been made under date of March 16, 1946, and as so amended, it constitutes the agreement upon which this action is based (R. 61, 122, 130, 132). The agreement, as amended, will be referred to in its amended form simply as the "Agreement." In the forepart of the Agreement the term "the Union" is specifically designated as embracing both the International and Lodge 751 (R. 66-67).

Boeing, on December 31, 1947, succeeded to its pred-

ecessor's rights and obligations under the Agreement pursuant to the corporate mergers described in paragraph III of the Amended Complaint (R. 30, 572-594).

On the matter of strikes the Agreement stated (R. 114):

> "1. During the life of this agreement no strikes shall be caused or sanctioned by the Union, and no lockouts shall be made by the Company. * * *"

A strike of the employees covered by the Agreement began on April 22, 1948, and continued from that date until September 13, 1948 (R. 62, 123, 130-131, 133).

The Agreement required that all employees covered thereby become and remain members of the International "through" Lodge 751 (R. 72) and thus, immediately prior to the strike, substantially all such employees of Boeing were members of the International "through" Lodge 751. These employees numbered approximately 14,500 (R. 53, 57, 141-142, 187-189). The strike at the outset on April 22, 1948, paralyzed Boeing's operations within the State of Washington and although some production work was gradually resumed during the strike on a reduced scale, substantial curtailment of operations continued until and after the termination of the strike on September 13, 1948 (R. 126, 127, 245-247).

There is no question but that the strike was authorized and called, and promoted throughout its duration, by Lodge 751 (R. 53-54, 57-58, 62, 123, 130, 133, 141-142, 188-189). As to the International the record shows that the latter publicly announced its approval and sanction of the strike on and after April 28, 1948 (R. 527,

The petitioner, Boeing Airplane Company, will be referred to as "Boeing"; respondent Aeronautical Industrial District Lodge No. 751 of the International Association of Machinists will be referred to as "Lodge 751"; and the respondent International Association of Machinists will be referred to as the "International".

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There is no question but that the strike was authorized and called, and promoted throughout its duration, by Lodge 751 (R. 53-54, 57-58, 62, 123, 130, 133, 141-142, 188-189). As to the International the record shows that the latter publicly announced its approval and sanction of the strike on and after April 28, 1948 (R. 527,

615); that it supported those engaged in the strike and paid strike donations to them (R. 527, 615, 621); that under the terms and provisions of its constitution (R. 457-469) it had domination and control of the actions of Lodge 751 and the government of Lodge 751 was vested in it (R. 458); and that as indicated above, it constituted, with Lodge 751, the "Union" as that term is used in the Agreement, and was thereby expressly bound under the language of the Agreement to "enforce and carry out" all of the provisions thereof (R. 66-67).

Bearing on the point (hereinafter discussed) relating to the nature of the breach of the Agreement, as amounting to a total breach or a repudiation of it, the undisputed record shows that the strike was called some 36 hours after Lodge 751 had delivered to Boeing a written ultimatum, requiring that Boeing either (a) accept a new and materially different collective bargaining agreement containing terms demanded by Lodge 751 or (b) face a strike (R. 183-184).

Boeing's reply, prior to the strike, discussed the terms of the ultimatum and reaffirmed the continuing effectiveness of the Agreement (R. 184-186).

The strike was called, nevertheless, and Boeing on April 22, 1948, wrote to Lodge 751 as follows (R. 186-187):

"Mr. Harold J. Gibson, President
Aeronautical Industrial District Lodge No. 751
5502 Airport Way
Seattle, Washington

Dear Mr. Gibson:

The strike which began last night and which is now continuing at the Seattle plants of the Company and which the union caused and sanctioned is in direct violation and repudiation of the Collective Bargaining Agreement dated January 5, 1944, as amended March 16, 1946, between Boeing Aircraft Company and Aeronautical Industrial District Lodge 751 and International Association of Machinists.

By reason of this strike, you are hereby notified that the agreement referred to above is terminated and at an end.

Yours very truly,

A. F. LOGAN,
Director Industrial Relations."

Boeing then instituted this action on May 5, 1948, thirteen days after the strike began, alleging damages resulting from the strike in the amount of $2,250,000 and further alleging that additional damages would be incurred by Boeing if the strike were to continue thereafter (R. 3-8). The strike was nevertheless continued by respondents for more than four months after commencement of the action. In the amended complaint filed in this action Boeing alleged damages in the amount of $9,045,000 (R. 29-36). At the pre-trial hearing Boeing's damages resulting from the strike were computed by Boeing to be in excess of $7,602,086 (R. 1155).

Prior to the trial date Boeing moved for a summary judgment in its favor, except as to the amount of damages, as provided by Rule 56 of the Rules of Civil Procedure (R. 571). After orally denying this motion, the District Court in substance invited respondents to file motions for summary judgment (R. 1220, 1223). Respondents filed such motions and on June 14, 1950, the District Court granted respondents' motions for summary judgment and entered a final judgment of dismissal against Boeing (R. 694-696).

In granting respondents' motions for summary judgment the District Court reached the following conclusions, among others:

1. That although the Agreement was in full force and effect when the strike occurred (R. 652-659), and although the strike constituted a material breach of the Agreement (R. 674-676), nevertheless the previously quoted Boeing letter of April 22, 1948, rescinded instead of terminated the Agreement, and its execution and delivery by Boeing barred and foreclosed Boeing from recovering anything against either respondent (R. 676-691);
2. That even if Lodge 751 were deemed guilty of violating the Agreement, there is nevertheless no liability on the part of the International (R. 692).

From the Judgment of Dismissal entered by the District Court on June 14, 1950, an appeal was taken by Boeing to the Court of Appeals below (R. 697).

In the Court of Appeals the cause was argued March 21, 1951, before Circuit Judges Bone and Hastie (the latter being from the Third Circuit) and was submitted also to Circuit Judge Healy on the briefs (R. 1345). Six

days later, on March 27, 1951, the Court issued its *per curiam* opinion affirming the lower court (R. 1347-1349), the opinion being published at 188 F.2d 356. No petition for rehearing was filed.

The Court of Appeals based its affirmance of the dismissal solely on the Boeing letter of April 22, 1948, and held in effect that Boeing, as a matter of law, could not possibly have *terminated* the Agreement after the strike began without, at the same time, automatically accomplishing a *rescission* of it and forfeiting all right to damages resulting from the strike. To quote the Court of Appeals (R. 1348):

> "The *power of termination* which accrues to the wronged party as a result of such a breach and was exercised by Boeing in this case is a *right of rescission* which leaves neither party with any basis thereafter to complain of the conduct of the other as a breach of the contract." (Italics added.)

This conclusion of the Court of Appeals was reached despite the fact that the court held (1) that the Agreement was in full force and effect when the strike occurred, (2) that the strike constituted a material breach of the Agreement, (3) that Boeing suffered great detriment from the strike and (4) that Boeing declared its intention to *terminate* (rather than *rescind*) the Agreement.

The holding of both courts below that the Agreement was effective and was breached by the strike is consistent with the previous decision of the United States Court of Appeals for the District of Columbia Circuit on the identical facts and involving the same Agreement. *Boeing Airplane Company v. National Labor Relations Board,* 174 F.2d 988 (1949).

JURISDICTION

1. The jurisdiction of this Court to review the judgment of the Court of Appeals is based upon Title 28, United States Code, section 1254(1).

2. This petition is timely filed. The judgment of the Court of Appeals was entered March 27, 1951 (R. 1350). Under Title 28, United States Code, section 2101(c) the application for writ of certiorari may be made within 90 days after the entry of judgment. The fact that the mandate of the Court of Appeals has already issued to the District Court is immaterial and does not render this application untimely or defeat the jurisdiction of this Court. *The Conqueror,* 166 U.S. 110, 113 (1897); *Louisville & Nashville Railroad Co. v. Behlmer,* 169 U.S. 644, 648 (1898); *Carr v. Zaja,* 283 U.S. 52, 53 (1931); and *Aetna Casualty & Surety Co. v. Flowers,* 330 U.S. 464, 467 (1947).

3. The jurisdiction of the Court of Appeals is based upon Title 28, United States Code, sections 1291 and 1294. The jurisdiction of the District Court is based upon Title 29, United States Code, section 185, and Title 28, United States Code, section 1332.

QUESTIONS PRESENTED

1. Whether Boeing's letter to Lodge 751 of April 22, 1948, stating that by reason of the strike the Agreement "was terminated and at an end" rescinded instead of terminated the Agreement and constituted a bar to this action for damages as to both respondents as a matter of law.

The Court of Appeals answered this question: Yes.

2. Whether the actions and conduct of the respondents, as shown by the record, constituted a violation of the Agreement as to the International as well as Lodge 751, rendering both liable in damages therefor.

The Court of Appeals did not answer this question.

REASONS FOR ALLOWANCE OF WRIT

A.

The decision of the Court of Appeals is in conflict with applicable decisions of the Supreme Court of the State of Washington on an important matter of local law, because:

1. If, as the Court of Appeals found, the strike is to be regarded merely as a *material* breach (as distinguished from a *total* breach or *repudiation*) of the Agreement, Boeing was entitled, under Washington law, to terminate the Agreement and sue for damages. In *Campbell v. Hauser Lumber Co.,* 147 Wash. 140, 265 Pac. 468 (1928) and *Dyer v. Middle Kittitas Irrigation Dist.,* 25 Wash. 80, 64 Pac. 1009 (1901) the Washington court held that whenever one party to a contract is guilty of a material breach, the other party is at

liberty to terminate the contract and maintain an action in damages for the breach. In denying to Boeing the right of termination upon the commission by the union of a material breach of the Agreement, and in holding that the Boeing letter constitutes a bar to this action, the decision of the Court of Appeals below is in conflict with the above-cited decisions of the Supreme Court of the State of Washington on a matter of local law.

2. The undisputed record and particularly the language of the union's pre-strike ultimatum show conclusively that the strike must be regarded as a total breach and repudiation of the Agreement which entitled Boeing, under Washington law, to terminate the Agreement and sue for damages. In *Town of Castle Rock v. Furth,* 78 Wash. 47, 138 Pac. 317 (1914) and *Boyer v. City of Yakima,* 156 Wash. 518, 287 Pac. 211 (1930) the Washington court held that in the event of the same type of breach and repudiation as occurred here the injured party has available three alternative remedies, one of which is to declare the contract terminated and maintain an action for damages for breach thereof. In regarding the strike as something less than a total breach and repudiation of the Agreement and in denying to Boeing for that reason the right to terminate the Agreement and sue for its breach, the decision of the Court of Appeals below is in conflict with the above-cited decisions of the Supreme Court of the State of Washington on a matter of local law.

3. Irrespective of the type of breach involved, if the alternative of terminating the Agreement and suing

for breach thereof was not available to Boeing upon the occurrence of the strike, Boeing's mistaken attempt to pursue such alternative does not, under Washington law, bar this action for damages. In *Willis T. Batcheller, Inc., v. Welden Const. Co.*, 9 Wn.2d 392, 403, 115 P.2d 696, 701 (1941); *Spokane Security Finance Co. v. Crowley Lumber Co.*, 150 Wash. 559, 274 Pac. 102 (1929); *Godefroy v. Reilly*, 146 Wash. 257, 262 Pac. 639 (1928); *Roy v. Vaughan*, 100 Wash. 345, 170 Pac. 1019 (1918) and other cases, the Washington court held that where a party mistakenly attempts to exercise a right or remedy to which he is not entitled, he is not thereby precluded from thereafter prosecuting an action based on another right or remedy. Assuming that the Court of Appeals below was correct in holding that no right of termination was available to Boeing following the strike, its decision is in conflict with the above-cited decisions of the Supreme Court of the State of Washington in failing to allow Boeing to pursue its correct remedy (namely, this suit for damages) despite the attempted termination of the Agreement.

B.

The question here involved is one of extremely great and general importance. Particularly since the enactment of the Wagner Act, the relationships and obligations established by the collective bargaining type of agreement in the United States have had a vital and direct impact on substantially all persons in this country. From the standpoint of the effect and influence upon our society of the many thousands of collective bargaining agreements now in force, this type of

agreement is in a sense the most important type of legal document in current use in the United States. The strike has often been referred to as labor's most powerful economic weapon and thus a provision in a collective bargaining agreement whereby a labor organization agrees to withhold use of that drastic weapon must necessarily be considered a vital provision of such an agreement.

We submit, therefore, that there could be few cases of greater general importance than one involving the question as to what an employer can do, or cannot do, where a labor organization chooses to use the strike weapon despite the existence of a no-strike provision in the applicable collective bargaining agreement.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari to review the decision of the Court of Appeals of the Ninth Circuit should be granted.

FRANK E. HOLMAN
LOWELL P. MICKELWAIT
Counsel for Petitioner,
Boeing Airplane Company.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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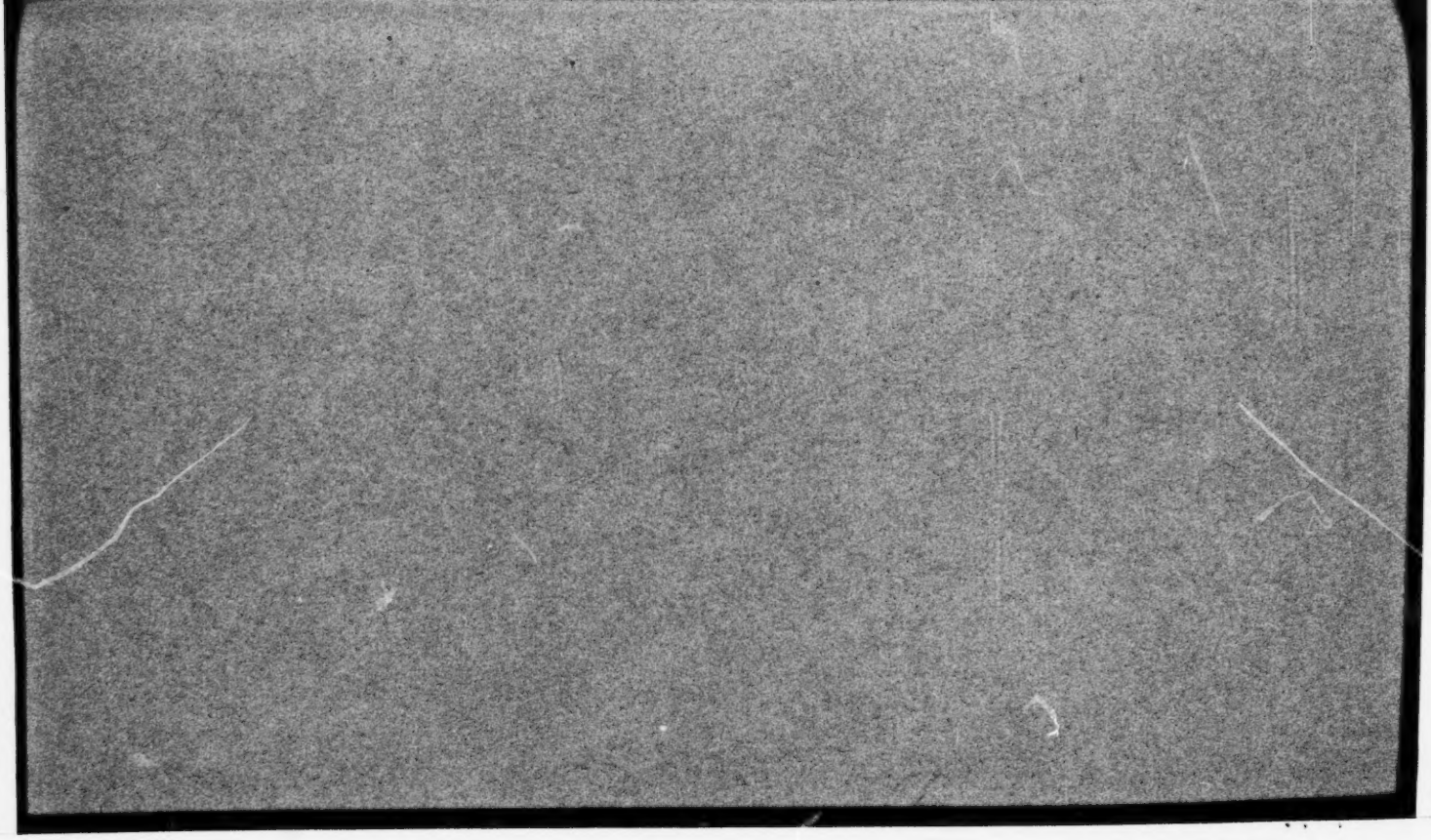

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

OPINIONS OF THE COURTS BELOW

The judgment of the United States District Court for the Western District of Washington, Northern Division, dismissing this action, was entered June 14, 1950 (R. 694-696). The District Court's opinion appears in the record (R. 641-693) and is reported at 91 F.Supp. 596.

The per curiam opinion of the Court of Appeals below appears in the record (R. 1347-1349) and at 188 F.2d 356. The judgment of the Court of Appeals was entered March 27, 1951 (R. 1350). No petition for rehearing was filed.

II.

JURISDICTION

The jurisdictional statement appears in the preceding petition for writ of certiorari (supra, p. 8).

III.

STATEMENT

The essential facts are stated in the preceding petition for writ of certiorari (supra, pp. 1 to 7) and in the interests of brevity are not repeated here. Any necessary elaboration of the evidence will be made in the course of the argument which follows.

IV.

SPECIFICATION OF ERRORS

1. The Court of Appeals erred in holding that the letter of April 22, 1948 (R. 1014) written by Boeing to Lodge 751 accomplished a rescission of the Agreement as a matter of law and that its execution and delivery by Boeing barred Boeing from recovering anything in this action against either respondent.

2. If the letter did not bar this action, the Court of Appeals then erred in failing to conclude from the facts of record (which are undisputed) that Lodge 751 is liable for the damages to Boeing that resulted from the strike.

3. If the letter did not bar this action, the Court of Appeals then erred in failing to conclude from the facts of record (which are undisputed) that the International is liable for the damages to Boeing that resulted from the strike.

4. The Court of Appeals erred in affirming the judgment of the United States District Court for the Western District of Washington, Northern Division, which granted the respondents' motions for summary judgment and entered judgment of dismissal of this action.

V.

ARGUMENT

A. The Decision of the Court of Appeals That the Boeing Letter of April 22, 1948, Constitutes a Bar to This Action Is in Direct Conflict with Applicable Decisions of the Supreme Court of the State of Washington on an Important Question of Local Law.

The sole basis for the decision of the Court of Appeals is the Boeing letter of April 22, 1948, sent to Lodge 751 on that date. The decision holds the letter to constitute a bar to this action. Whether the letter constitutes such a bar is a question of local Washington law. There is a direct conflict between the decision of the Court of Appeals and the applicable decisions of the Supreme Court of the State of Washington on this question of local law, because:

(1) If, as the Court of Appeals found, the strike is to be regarded merely as a *material* breach (as distinguished from a *total* breach or a *repudiation*) of the Agreement, Boeing was entitled, under Washington law, to terminate the Agreement and maintain this action for damages. The holding that Boeing had no right of termination and that the Boeing letter constitutes a bar to this action is in conflict with the applicable decisions of the Supreme Court of the State of Washington.

(2) The undisputed record and particularly the language of the union's pre-strike ultimatum show conclusively that the strike was a total breach and repudiation of the Agreement which, under Washington law, entitled Boeing to terminate the Agreement and maintain this action for damages. The holding that Boeing had no right of termination and that the Boeing letter constitutes a bar to this action is in conflict with the applicable decisions of the Supreme Court of the State of Washington.

(3) Irrespective of whether the strike constituted a "material breach" or a "total breach" or a "repudiation" of the Agreement — if the remedy of terminating the Agreement and suing for breach thereof was not available to Boeing when the strike occurred, and Boeing mistakenly attempted to pursue such remedy by executing and delivering its letter of termination, a holding that the letter constitutes a bar to this action is in conflict with the applicable law of the State of Washington as established by the Supreme Court of that State.

Before discussing these three points separately, the following general observations are appropriate:

It may be taken as established for the purposes of this petition that (a) there was in effect at the time the strike began the Agreement between all parties to this action containing a prohibition against strikes during the life of the Agreement; and (b) the strike which commenced April 22, 1948, and continued for more than four months was, at the very least, a material breach of the Agreement. The District Court below so held

(R. 652-659, 674-676) and the Court of Appeals in holding that the "union had been guilty of a material breach" (R. 1348) reached the same conclusion. This is consistent with the previous decision of the United States Court of Appeals for the District of Columbia Circuit on the identical facts and respecting the same Agreement in *Boeing Airplane Company v. National Labor Relations Board,* 174 F.2d 988 (1949) where such court held that the strike was an unlawful strike because of its failure to comply with the 60-day notice provision of Section 8(d) of the National Labor Relations Act and that the union violated the no-strike clause of the Agreement.

The question as to whether the Boeing letter of April 22, 1948, constitutes a bar to this action is a matter of local law which, under the doctrine of *Erie Railroad Co. v. Tompkins,* 304 U.S. 64 (1938), is to be determined upon the basis of the applicable law in the State of Washington. *Ruhlin v. New York Life Ins. Co.,* 304 U.S. 202 (1938); and cases cited in 28 U.S.C.A. § 1652, notes 123-140. This has been conceded by all parties to this action. The District Court so stated (R. 690). It is assumed the Court of Appeals was of the same view, although nothing was said on the subject in its opinion. The Agreement was entered into at Seattle, Washington (R. 66) and it related to terms and conditions of employment of employees at Boeing's plants in the State of Washington (R. 31-33, 37-38, 42).

For the convenience of the court in considering this question, the text of the letter of April 22, 1948, is again quoted in full (R. 186-187):

[Addressed to Lodge 751]

"*The strike* which began last night and which is now continuing at the Seattle plants of the Company and which the union caused and sanctioned *is in direct violation and repudiation of the* Collective Bargaining *Agreement* dated January 5, 1944, as amended March 16, 1946, between Boeing Aircraft Company and Aeronautical Industrial District Lodge 751 and International Association of Machinists.

By reason of this strike, you are hereby notified that the agreement referred to above is terminated and at an end." (Italics added)

[Signed for Boeing]

The decision of the Court of Appeals turned largely upon the question of whether the letter accomplished a "rescission" of the Agreement. In this connection it is to be observed: that the letter contains no mention whatever of the terms "rescind" or "rescission"; that it does not purport to release or cancel any claim for damages; that it stated the strike was "in direct violation and repudiation" of the Agreement; and that it used the words "terminated and at an end" which words can only indicate an intention to put an end to Boeing's contractual obligations as to future performance, and cannot properly be regarded as expressing an intention to rescind or completely wipe out the Agreement from the beginning.

Moreover, on the matter of what Boeing intended to do when it sent the letter, the Court of Appeals interpreted the language of the letter as expressing only an intention on the part of Boeing to terminate the Agree-

ment. Note the court's statement on this point: "in a letter to the local, received within 12 hours after the strike began, *Boeing declared its election to terminate*" the Agreement (R. 1348) (Italics added). The court held, nevertheless, that the letter automatically and as a matter of law accomplished a rescission of the Agreement and forfeited all right to damages resulting from the strike.

The points heretofore enumerated on pages 15 and 16 of this brief, which in our view compel the conclusion that the decision of the Court of Appeals is in conflict with applicable decisions of the Supreme Court of the State of Washington, are now separately discussed under appropriate headings.

1. If the strike constituted merely a material breach of the Agreement, as the Court of Appeals found, the conflict of decision exists.

At the very least the strike constituted a material breach of the Agreement. It was so held by both courts below. Regardless of whether the strike, coupled with the union's pre-strike ultimatum letter, also amounted to an "abandonment or total repudiation" of the Agreement, the Washington cases clearly hold that in the event of a material breach of a contract the injured party may treat the contract as terminated and enforce a right of action against the wrong-doer for damages. *Campbell v. Hauser Lumber Co.,* 147 Wash. 140, 265 Pac. 468 (1928); *Dyer v. Middle Kittitas Irrigation District,* 25 Wash. 80, 64 Pac. 1009 (1901).

In *Campbell v. Hauser Lumber Co.,* 147 Wash. 140, 265 Pac. 468 (1928) *supra,* the lumber company was

sued by the contractor (Campbell) for damages resulting from the breach of a logging contract by reason of its order to the contractor's foreman to cease cutting timber upon one of the tracts covered by the contract. The contractor thereafter "gave notice of his election to treat the contract as breached" and ceased further performance of the work under the contract. The contractor then brought suit against the lumber company for damages for breach of contract. The Washington Supreme Court, affirming the judgment for damages rendered by the trial court, held as follows (147 Wash. 144, 265 Pac. 470):

> "*The appellant further contends that,* if it be conceded that the breach committed by the appellant was of a substantial part of the contract, *the breach did not justify an entire abandonment of the contract on the part of the respondent.* The argument is that the breach must be of a vital term of the contract, rendering the performance of the remainder impossible, or at least impractical, before the party against whom the breach is committed is justified in abandoning performance in its entirety. But we do not understand that the rule goes to this extent. The authorities generally hold, and it is the just rule, we think, that *if the breach be of a substantial part of an entire contract, as distinguished from a part that is immaterial or inconsequential,* though the breach may not render a performance of the remainder impossible or impractical, *an abandonment of the whole is justified.* Doubtless, in such a case the party against whom the breach is committed may perform that part of the contract he is permitted to perform, and resort to an action in damages for the breach. But he has

a choice of remedies, and as the choice is with him, the other party may not lawfully complain of his choice." (Italics added.)

The Washington decisions on this point are in accord with the general rule. See: *Anvil Mining Co. v. Humble,* 153 U.S. 540 (1894); *Pierce v. Tennessee Coal I. & R. Co.,* 173 U.S. 1 (1899); *Guerini Stone Co. v. P. J. Carlin Const. Co.,* 248 U.S. 334 (1919); *Michigan Yacht & Power Co. v. Busch,* 143 Fed. 929 (CA 6, 1906).

Anvil Mining Co. v. Humble, 153 U.S. 540 (1894) *supra,* involved a contract for mining iron ore. Performance had been commenced but the mining company, in breach of the contract, prevented further performance. In affirming a judgment for damages this court stated (153 U.S. 551):

"It is insisted and authorities are cited in support thereof, that a party cannot rescind a contract and at the same time recover damages for his nonperformance. But no such proposition as that is contained in that instruction. It only lays down the rule, and it lays that down correctly, which obtains when there is a breach of a contract. *Whenever one party thereto is guilty of such a breach as is here attributed to the defendant, the other party is at liberty to treat the contract as broken and desist from any further effort on his part to perform; in other words, he may abandon it, and recover as damages the profits which he would have received through full performance.* Such an abandonment is not technically a rescission of the contract, but is merely an acceptance of the situation which the wrong doing of the other party has brought about." (Italics added.)

The same Court of Appeals that decided this case below has previously held that for a breach of a contract to cut and remove timber, after partial performance of the contract, the government had the right to "cancel" the contract and recover damages for its breach. *United States v. Harris,* 100 F.2d 268 (CA 9, 1938); rehearing denied 103 F.2d 1020. In this connection the Court of Appeals for the Ninth Circuit said (100 F.2d 273):

> "The referee concluded that the contract was enforceable and that there had been an anticipatory breach entitling the Government to rescind or sue for damages. *He found that the Government's use of the word 'canceled' in its letter terminating the contract was not to be taken as indicative of an intent to rescind, and that there had been no waiver of the right to damages.* Without discussion of the latter point, still a subject of debate here, we may say at once that *we regard it as having been correctly decided.* Restatement of Contracts, § 410, Comment b; see, also, *P. J. Carlin Const. Co. v. Guerini Stone Co.,* 1 Cir., 241 F. 545, 554; *Moore v. Beiseker,* 8 Cir., 147 F. 367, 378." (Italics added.)

Having the right, in the event of a material breach, to terminate the contract and sue for damages, Boeing by its letter of April 22, 1948, definitely adopted this course. There is no authority for the conclusion reached by the Court of Appeals below that "The power of termination which accrues to the wronged party as a result of such a [material] breach and was exercised by Boeing in this case is a right of rescission * * *" (R. 1348) and none is cited by that court. In so holding the decision is in conflict with the above cited Washington decisions as well as with the decisions of this court.

2. The strike actually constituted a total breach and repudiation of the Agreement, as is shown by the undisputed facts of record, in which event the conflict of decision exists.

The Court of Appeals apparently concluded that Boeing's letter of April 22, 1948, would have accomplished merely a termination (leaving intact this cause of action for damages) and not a rescission, had the strike amounted to an "abandonment or total repudiation" of the Agreement (R. 1348). Just what was meant by those terms is not stated in the Court of Appeals' opinion, but it did approve the District Court's opinion on this point. The latter court used the terms "abandonment, repudiation or total breach" in discussing this matter (R. 679-681).

Let us assume (which we do not believe to be the case —see Restatement, Contracts, § 317, 318) that an important distinction can be made between a material breach and a total breach or repudiation, and that the right of election to terminate, instead of to rescind, a contract is not available to the injured party in the event of a "material breach" while it is available in the event of a "total breach" or "repudiation," as implied by the Court of Appeals in its opinion. That the circumstances here amounted to both a total breach and a repudiation is established by the following undisputed facts of record:

April 20, 1948, Lodge 751 delivered its ultimatum letter stating that unless its proposal of a new and materially different agreement was accepted by Boeing in its entirety by noon the next day, the proposal would be automatically withdrawn, the letter

ending with this sentence: "In which case [in other words, if Boeing did not comply with the Union's demand for a new contract] Lodge 751 reserves the right to take appropriate action including a work stoppage." (R. 183-184).

April 21, 1948, Boeing answered this letter, reminding Lodge 751 that the agreement was in full force and effect and concluding as follows: "In your second letter you 'reserve the right' to cause a work stoppage. Such action would be in direct violation of the contract, including the 'no-strike' provision thereof." (R. 184-186).

April 22, 1948, at 12:15 a.m. the strike began. Over 14,500 workers went out on strike, completely paralyzing Boeing's operations within the State of Washington (R. 53, 141, 245-247).

April 22, 1948, at 10:25 a.m. Boeing's letter was delivered which stated that "By reason of this strike, you are hereby notified that the agreement referred to above is terminated and at an end." (R. 186-187).

April 27, 1948, the President of Boeing advised the International that he would attend a meeting with them only to discuss such matters as "the payment of damages caused by the strike" and the action to be taken by the parent organization against Lodge 751 for calling the strike (R. 236).

April 28, 1948, the International announced its sanction of the strike (R. 455-456).

May 5, 1948, (only 13 days after the strike began) this action was commenced to recover damages for breach of the Agreement (R. 3-9).

It would be difficult to imagine circumstances showing more convincingly an unequivocal repudiation of a

contract. Although there was in effect a labor contract binding the union not to strike, nevertheless the strike was threatened *unless a completely new agreement be forthwith substituted in its entirety for the old agreement* (R. 310-311) and upon refusal of the other party to accept the ultimatum the strike commenced 36 hours later. Such actions on the part of the respondents made it abundantly clear that they did not intend to perform their contractual obligations and therefore that they repudiated the Agreement. Where one party to a contract refuses to perform unless the other party agrees to a material modification of the contract, or to the addition of new terms, such conduct amounts to a "repudiation" or "renunciation" of the contract. *Jordan v. Madsen,* 69 Utah 112, 252 Pac. 570 (1926); *Ewing v. Von Nieda,* 76 F.2d 177, 182 (CA 8, 1935). This is exactly what Boeing meant in its termination letter when it began the letter by stating that "The strike * * * is in direct violation and *repudiation* * * *" of the Agreement (R. 186) (Italics added).

The Supreme Court of the State of Washington has held that a repudiation of this character entitles the injured party to an election to pursue any of three alternative remedies, one of which is to terminate the contract and sue for damages for breach thereof.

In *Town of Castle Rock v. Furth,* 78 Wash. 47, 138 Pac. 317 (1914) the Washington court had occasion for the first time to endorse and make a part of the law of Washington the rule established in *Lake Shore & M. S. Ry. Co. v. Richards,* 152 Ill. 59, 38 N.E. 773 (1894), a leading case on this subject. The *Castle Rock* case was

an action by a municipality against contractors and their bondsmen for breach of a construction contract under which the contractors were given a franchise and agreed to construct an electric light system for the municipality. Upon their failure to construct the system within the time required "the City Council passed an ordinance declaring their rights forfeited, and gave notice thereof" (78 Wash. 50, 138 Pac. 318) and entered into contracts with other parties for supplying the municipality with electricity. In affirming a judgment for damages in favor of the municipality the Washington Supreme Court said (78 Wash. 51, 138 Pac. 318):

> "It is next contended that, since the council passed an ordinance *revoking* the franchise ordinance for which the bond was given to secure the faithful performance of on the part of Furth and Brown, such *revocation* amounted to a *rescission* by the town of the contract evidenced by the franchise ordinance, and that, therefore, there is no foundation for the recovery. We are unable to see the force of this contention. Furth and Brown had not only failed to perform their obligations under the franchise ordinance within the time therein specified, but it is also manifest that they were not in a position at that time to do so, and had no intention of doing so. In other words, they had abandoned all their rights and repudiated all their obligations thereunder. *Clearly, the town had the right to treat the franchise contract as abandoned by Furth and Brown and to recover upon the bond for whatever damage it suffered by reason of such abandonment. Lake Shore & M. S. R. Co. v. Richards*, 152 Ill. 59, 38 N.E. 773; see note to this case in 30 L.R.A. 33." (Italics added.)

It should be observed that in the *Castle Rock* case the same contention was made as in the instant case, namely, that the action of the municipality (the passage of the ordinance of revocation) amounted to a "rescission" barring the action for damages for breach of contract. If a revocation ordinance does not accomplish a rescission it is difficult to conceive how the Boeing letter of April 22, 1948, could possibly be a rescission.

That the rule laid down in the *Lake Shore* case is still the law in the State of Washington is conclusively established by *Boyer v. City of Yakima,* 156 Wash. 518, 287 Pac. 211 (1930). The plaintiff sued the city for damages as a result of a breach by the city of its contract with plaintiff covering the construction of a reservoir. After the work was 75% to 80% complete the city took over the premises and prevented the plaintiff from completing the work. In discussing plaintiff's right of election to treat the city's actions as a breach or repudiation of the contract, the Washington court said (156 Wash. 523, 287 Pac. 213):

> "The law touching the rights of a party to a contract injured as appellants are alleged to have been injured is well stated in the leading case of *Lake Shore & M. S. R. Co. v. Richards,* 152 Ill. 59, 30 L.R.A. 33, as follows:
>
> " 'It is well settled that where one party repudiates the contract and refuses longer to be bound by it, the injured party has an election to pursue either of three remedies: he may treat the contract as rescinded, and recover upon *quantum meruit* so far as he has performed; or he may keep the contract alive for the benefit of both parties, being at all times himself ready and able to perform, and,

at the end of the time specified in the contract for performance, sue and recover under the contract; *or he may treat the repudiation as putting an end to the contract for all purposes of performance, and sue for the profits he would have realized if he had not been prevented from performing. In the latter case the contract would be continued in force for that purpose.'*

"In the text of 37 C.J. 816, the applicable law seems to us to be well stated, in the light of the authorities, as follows:

" 'According to the rule that, where one party to an executory contract renounces it before full performance has been made by the other, the latter is not bound to continue to perform but may sue at once for the breach, it is held that the statute begins to run from the time of the renunciation, but not until then. *But in order for this rule to apply the party to whom the renunciation is made must accept it as a breach and treat the contract as at an end.'* [Citing *Roehm v. Horst,* 178 U.S. 1, and other authorities.]" (Italics added.)

The Washington rule is in accord with the great weight of authority, including the decisions of this court, of which the following are illustrative: *Roehm v. Horst,* 178 U.S. 1 (1900); *Lovell v. St. Louis Mutual Life Ins. Co.,* 111 U.S. 264 (1884); *Bu-Vi-Bar Petroleum Corp. v. Krow,* 40 F.2d 488 (CA 10, 1930); *United Press Assn. v. National Newspaper Assn.,* 237 Fed. 547 (CA 8, 1916); *Lake Shore & M. S. Ry. Co. v. Richards,* 152 Ill. 59, 38 N.E. 773 (1894).

Under Washington law Boeing had the right to treat the strike as a total breach and repudiation of the

Agreement and to terminate the Agreement without forfeiting its claim for damages resulting from the strike. In denying this right to Boeing and in holding that its letter of termination accomplished a complete rescission of the Agreement, barring this action for damages, the Court of Appeals' decision is in conflict with the controlling decisions of the Supreme Court of the State of Washington.

3. Irrespective of the type of breach involved, and assuming Boeing did not have the right to terminate the Agreement, nevertheless the conflict of decision exists.

The argument in the foregoing parts 1 and 2 has proceeded on the basis that whether the strike be regarded as merely a "material" breach (as found by the Court of Appeals) or as a "total breach or repudiation" (which it actually was) Boeing had the right of election to terminate the Agreement. As has already been stated, the Boeing letter of April 22, 1948, made no mention whatsoever of the terms "rescind" or "rescission" and concluded with the statement that the Agreement was "terminated and at an end" (R. 186-187). The Boeing letter could not more clearly have expressed an intention to terminate, rather than rescind, the Agreement. And the Court of Appeals so found, saying that by the letter "Boeing declared its election to terminate" the Agreement (R. 1348).

Although the District Court was of the view that the use of the phrase "terminated and at an end" in the letter signified Boeing's intention to rescind the Agreement (R. 690-691) this conclusion was based solely upon

Beltinck v. Tacoma Theater Co., 61 Wash. 132, 111 Pac. 1045 (1910). A careful reading of that 1910 case, however, and of the briefs filed with the Washington Supreme Court in connection therewith, demonstrates conclusively that the *Beltinck* decision has no bearing whatsoever on the instant case. The issue as to whether the phrase "terminated and at an end" accomplished a termination as distinguished from a rescission was not before the court. In the *Beltinck* case, the party who *wrote* the letter was sued for damages for failing to carry out the contract *after the date of the letter.* The result of the case would have been exactly the same had the Washington court called the legal effect of the letter there involved a "rescission" or "termination" because in either event the letter would have effectively cut off any contractual obligations of the party who wrote the letter as to future performance.

If, as Boeing contends, the alternative of termination *was* available to Boeing following the strike, the letter could not have constituted an election which would have the effect of barring this action for damages. Under Washington law the doctrine of election of remedies is not applicable unless there are two or more coexistent remedies available to the party at the time of the election which are *repugnant and inconsistent.* The rule of irrevocable election does not apply where the remedies are *cumulative and consistent. Labor Hall Assn., Inc. v. Danielsen,* 24 Wn.2d 75, 84, 163 P.2d 167, 171 (1945) and cases therein cited. Under the Washington decisions cited in parts 1 and 2 above, the declaration that a contract is "terminated and at an end" is not repug-

nant to or inconsistent with a suit for damages. An action for damages, after termination of the contract by reason of a breach by the other party, is *cumulative* to termination rather than inconsistent with or repugnant to termination.

The Court of Appeals, however, was of the view that only the right of rescission, rather than termination, was available to Boeing as a result of the strike and that the attempted termination of the Agreement by the letter of April 22, 1948, must be held as a matter of law to constitute an irrevocable election to rescind the Agreement which would bar this action for damages filed only 13 days later.

Assuming the alternative of termination was *not* available to Boeing (as the Court of Appeals implied) then the letter seeking termination did not effect a rescission or bar this cause of action for damages. The doctrine is firmly established in Washington that where a party mistakenly attempts to exercise a right or remedy to which he is not entitled, he is not thereby precluded from thereafter prosecuting an action based on an inconsistent right or remedy. The following is only a partial list of the many Washington cases upholding the above stated rule: *Willis T. Batcheller, Inc. v. Welden Const. Co.,* 9 Wn.2d 392, 403, 115 P.2d 696 (1941); *North Pacific Public Service Co. v. Clark,* 185 Wash. 132, 137, 52 P.2d 1255 (1936); *Morton Organ Co. v. Armour,* 173 Wash. 462, 469, 23 P.2d 887 (1933); *Spokane Security Finance Co. v. Crowley Lumber Co.,* 150 Wash. 559, 561, 274 Pac. 102 (1929); affirmed on rehearing 152 Wash. 697, 279 Pac. 103; *Godefroy v.*

Reilly, 146 Wash. 257, 264, 262 Pac. 639 (1928); *Harris v. Northwest Motor Co.,* 116 Wash. 412, 199 Pac. 992 (1921); *Roy v. Vaughan,* 100 Wash. 345, 347, 170 Pac. 1019 (1918).

In *Spokane Security Finance Co. v. Crowley Lumber Co.,* 150 Wash. 559, 274 Pac. 102 (1929) *supra,* the plaintiff sued defendant in the first action *on contract* on the theory the defendant had promised to pay the chattel mortgage and it resulted in a judgment of dismissal. The second action was brought against the same defendant *in tort* based on the theory of conversion. In holding that the first action, although pursued to judgment on an inconsistent theory, was merely a mistaken choice of remedy and did not preclude maintenance of the second action, the Washington Supreme Court said (150 Wash. 561, 562, 274 Pac. 104):

> "The present action, as above stated, was one for conversion. The first question is whether in the prior action the appellant had elected one of two inconsistent remedies, which would prevent the maintenance of the second action. If, in fact or in law, but one remedy originally existed, then the appellant did not make an election by mistakenly pursuing the first action based upon the theory of a contract. In 9 R.C.L., p. 962, it is said:
>
> " 'The principles governing election of remedies are necessarily based upon the supposition that two or more remedies exist. If in fact or in law only one remedy exists, there can be no election by the pursuit of another and mistaken remedy. *It is a well established rule that the choice of a fancied remedy that never existed and the futile pursuit of it, either because the facts turn out to be differ-*

ent from what the plaintiff supposed them to be, or the law applicable to the facts is found to be other than supposed, though the first action proceeds to judgment, does not preclude the plaintiff from thereafter invoking the proper remedy.'

"In *Roy v. Vaughan,* 100 Wash. 345, 170 Pac. 1019, it is said:

" 'Before there can be an election of remedies, there must be two or more inconsistent remedies available to a party, any one of which he is at liberty to pursue. That respondents erroneously believed themselves entitled to the first remedy sought does not prevent them, upon learning that their provable facts were insufficient to maintain that remedy, from seeking another remedy their facts would sustain. *A mistake in remedy can never be considered as an election of remedies.'*

* * *

"In the present case the appellant in its first action pursued a remedy which, by reason of its mistake of fact, it had no right to. No remedy of that kind was available to it. There was not therefore the choice of one of two inconsistent remedies." (Italics added.)

The Washington rule that where a party mistakenly attempts to exercise a right or remedy to which he is not entitled, he is not thereby precluded from thereafter prosecuting an action based on an inconsistent right or remedy, is almost universally established. See Restatement, Contracts, § 383; 28 C.J.S. 1080, § 12; 18 Am. Jur. 146, § 24; *Henderson Tire & Rubber Co. v. Gregory,* 16 F.2d 589 (CA 8, 1926).

From the foregoing authorities it would seem beyond

question that when the Court of Appeals concluded that the right of termination was not available to Boeing following the strike, the court was then bound, under Washington law, to have held that the termination letter of April 22, 1948, was merely a mistaken effort to pursue a remedy to which Boeing was not entitled and that it did not constitute a rescission or bar any action for damages. Instead, the Court of Appeals held, as a matter of law, that the attempted exercise of the right of termination accomplished automatically and irrevocably a rescission of the Agreement, thus forfeiting Boeing's claim for damages.

Assuming that the Court of Appeals below was correct in holding that no right of termination was available to Boeing following the strike, its decision was erroneous and in conflict with the above cited Washington decisions in failing to allow Boeing to pursue its correct remedy, namely, this suit for damages.

B. If the Boeing Termination Letter Did Not Bar This Action, Both Lodge 751 and the International Are Clearly Liable to Boeing for the Damages Resulting from the Strike.

The District Court held that if the Boeing letter did not constitute a rescission there still would be no liability on the part of the International (R. 692-693). The Court of Appeals did not pass on this question (R. 1347-1349).

If this petition for writ of certiorari is granted, petitioner intends to submit a brief on the merits which will establish beyond doubt the liability of both the International and Lodge 751 for damages resulting from the

strike. The following is a brief summary of the argument that will be so presented.

The strike was a violation by Lodge 751 of one of the most vital provisions of the Agreement and Lodge 751 is plainly liable for the resulting damages. The record shows clearly that Lodge 751 called the strike and promoted it throughout its duration. The District Court held that the strike occurred as a result of the acts of Lodge 751 and was a material breach of the Agreement. The Court of Appeals held the strike was a material breach of the Agreement.

The obligations of the no-strike clause of the Agreement were joint or joint and several. Both Lodge 751 and the International were named as parties in the Agreement and both were signatory thereto. The Agreement in the very beginning defined "Union" to include both Lodge 751 and the International. The no-strike clause read:

> "During the life of this agreement no strike shall be caused or sanctioned by the Union, and no lockout shall be made by the Company." (R. 114.)

Under the authorities the no-strike obligation was joint or joint and several and the International, as well as Lodge 751, is liable for damages resulting from a strike caused or sanctioned by either respondent.

Lodge 751 was an integral part of the International under the provisions of the latter's constitution and had no power, as such a lodge, to act autonomously. The International on its own, had full advance knowledge of the strike and by its statements and conduct, approved and sanctioned the strike from its inception,

directly contributed to the continuance of the strike from the beginning thereof, and ratified and confirmed the actions of Lodge 751 in causing and initiating the strike. The conclusion of the District Court that the International could "sanction" the strike with impunity because the International "was justified" in so doing, is completely unfounded.

CONCLUSION

It is respectfully submitted that the petition for certiorari to review the decision of the Court of Appeals for the Ninth Circuit should be granted.

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No. 149

In the
Supreme Court of the United States

OCTOBER TERM, 1951

BOEING AIRPLANE COMPANY, a corporation, *Petitioner*,

vs.

AERONAUTICAL INDUSTRIAL DISTRICT LODGE NO. 751 OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS, a labor organization; and INTERNATIONAL ASSOCIATION OF MACHINISTS, a labor organization, *Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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TRACY E. GRIFFIN
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SEATTLE PRINTING & [illegible] PUBLISHING COMPANY

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OCTOBER TERM, 1951

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In the
Supreme Court of the United States

OCTOBER TERM, 1951

BOEING AIRPLANE COMPANY, a corporation, *Petitioner*, vs. AERONAUTICAL INDUSTRIAL DISTRICT LODGE No. 751 OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS, a labor organization; and INTERNATIONAL ASSOCIATION OF MACHINISTS, a labor organization, *Respondents*.	No. 124

BRIEF FOR RESPONDENTS IN OPPOSITION

I.
OPINIONS OF THE COURTS BELOW

The judgment of the United States District Court for the Western District of Washington, Northern Division, dismissing this action, was entered June 14, 1950 (R. 694-696). The District Court's opinion appears in the record (R. 641-693) and is reported at 91 F. Supp. 596. The portion of the District Court's opinion expressly approved and adopted by the Court of Appeals and discussing the issue of rescission appears in the Record (R. 676-691) and is reported at 91 F. Supp. 609, et seq.

The opinion of the Court of Appeals below appears in the record (R. 1347-1349) and at 188 F. 2d 356. The judgment

of the Court of Appeals was entered March 27, 1951 (R. 1350). No petition for rehearing was filed.

II.
JURISDICTION

1. The jurisdiction of this Court to review the judgment of the Court of Appeals is based upon Title 28, United States Code, section 1254 (1).

2. The jurisdiction of the Court of Appeals is based upon Title 28, United States Code, sections 1291 and 1294. The jurisdiction of the District Court is based upon Title 29, United States Code, section 185, and Title 28, United States Code, section 1332.

III.
QUESTION PRESENTED

1. A strike occurred at 12:30 A.M. on April 22, 1948. Boeing believed that the then existing Labor Relations Agreement was unworkable and prevented Boeing from successfully operating its plants. At 10:30 A.M. on April 22, 1948, Boeing terminated the Agreement by letter containing the following language:

> "By reason of this strike, you are hereby notified that the agreement referred to above is terminated and at an end."

The District Court interpreted the letter of April 22, as an irrevocable election to rescind the contract and therefore, a bar to this action for damages. This interpretation and reasoning was expressly approved and adopted by the Court of Appeals. Are these concurrent findings of the two lower Courts correct?

IV.

STATEMENT

This is simply an action for damages for breach of a contract. After more than fourteen months of fruitless negotiations and at 12:30 A.M. on April 22, 1948, a strike occurred at Petitioner's plants in the State of Washington. The contract which it is claimed was in effect at the time of the strike had been last amended on March 16, 1946, and was between Boeing Airplane Company on the one hand, and Lodge 751 and International on the other hand. Since about June 17, 1937, Lodge 751 had been the exclusive collective bargaining representative for the production and maintenance workers at Boeing in the State of Washington, by virtue of certification by National Labor Relations Board. The contract by its terms was in effect to the 16th day of March, 1947, and "thereafter until a new agreement has been reached by the parties either through negotiation or arbitration." At the time of the strike it was apparent to everyone that it was impossible to arrive at a new agreement by negotiation and Boeing refused to submit the disputed items to arbitration unless it could, in effect, have the choice of arbiters (R. 143-187, 190-204, 221).

Boeing considered certain provisions of the contract as extremely burdensome upon it and maintained that the contract was unworkable from Boeing's standpoint and prevented it from successfully operating its plants. It so advertised to the public on May 4, 1948, in The Seattle Times, a newspaper with wide circulation in Seattle (R. 322), and made the same assertion in its report to stockholders July 30, 1948, (R. 490).

The strike occurred at 12:30 A.M., April 22, 1948. At 10:30 A.M. on that same day or approximately ten hours after the commencement of the strike and approximately an hour and a half after the beginning of a normal working day, Boeing took an immediate step to rescind and terminate the contract, in that at 10:30 A.M. on April 22, 1948, it caused to be delivered to Lodge 751 a letter signed by A. F. Logan, Director of Industrial Relations, containing among other things the following language (R. 1013):

> "By reason of this strike, you are hereby notified that the agreement referred to above is terminated and at an end."

This letter was written at the Boeing plant with the advice of their counsel, after consultation by all (R. 1020). It effectively terminated the contract.

Notwithstanding the strike the contract continued in effect until Boeing's letter of April 22, 1948, was delivered. Boeing conceded this in answer to an interrogatory (R. 477) and again at the pre-trial proceedings (R. 1021). In fact, upon the oral argument before the Court of Appeals Boeing expressly conceded that the contract remained in existence following the strike, and the purpose and effect of the letter of April 22, 1948, was to terminate the contract. This fact was expressly referred to by the Court of Appeals in its opinion (R. 1348).

Thereafter, a series of wires were exchanged between Boeing and the International in Washington, D. C., looking toward a meeting to be held in Seattle, Washington, by rep-

resentatives of the parties. At the time the meeting was scheduled, however, Boeing refused to allow its representatives to be present if representatives of Lodge 751 were to be present and if anything were to be discussed except the question of damages arising from the strike and similar matters. Copies of these wires are set forth in the transcript (R. 325-328).

On April 25, 1948, Boeing wrote Lodge 751 advising that it was no longer a collective bargaining representative of Boeing's employees (R. 318-319).

On May 6, 1948, Cyrus Ching, Director of Federal Mediation and Conciliation Service, wired William M. Allen, President of Boeing, requesting that representatives of the parties meet in joint conference with representatives of the Service in Washington, D. C., on May 10, 1948. There was a further exchange of wires on that day and upon May 7, 8, and 9, the result being that Boeing refused to meet with representatives of the Mediation and Conciliation Service (R. 328-336).

The records show beyond dispute that the only authorization or sanction to strike which was granted at any time by the Executive Council of International or the President of International, was granted on April 28, 1948, five days after Boeing rescinded the contract (R. 634-635).

The District Court interpreted the letter of April 22, 1948, as a letter of rescission and upon this interpretation held that this action in damages was barred (R. 676-691), (91 F. Supp. 609 et seq.). This interpretation and finding was expressly approved and adopted by the Court of Appeals (R. 1349).

V.

ARGUMENT

A. There is no question to be decided here of great and general importance but only one of interest to the immediate parties.

The correctness of the concurring decisions of the two Courts below in interpreting the letter quoted above as a rescission of the contract, after considering, "the document as a whole, the words used, the circumstances surrounding the writing of the letter, the relative position and circumstances of the parties," (R. 677) and then ascertaining the intent of the Company therefrom, presents a very special and limited question. This is solely a question of ordinary contract law. It is not affected by any principles of labor-management relations.

The Taft-Hartley Act (Labor Management Act of 1947, Act of June 23, 1947, Chpt. 120, Title III, Section 301, 61 Stat., Title 29, U.S.C.A. Sec. 185) did not change or alter contract obligations in any manner. It merely provides that suits for violation of contracts between an employer and a labor organization, representing employees in an industry affecting commerce may be brought in any District Court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

There is little chance that an instrument similar to the one involved here will ever require examination. If it does, it must be construed according to the laws of the state wherein the contract was made and in light of the circumstances and inten-

tions of the parties to a particular contract.

B. The Decisions of the Courts Below rested on the narrow issue of rescission based on the interpretation placed on the letter of April 22, 1948.

The Court of Appeals for the Ninth Circuit, with Judge Homer T. Bone, who was long a practicing lawyer in the State of Washington, presiding, stated as follows (R. 1348):

> "It was the principal and sufficient basis of the judgment below that in a letter to the local, received within 12 hours after the strike began, Boeing declared its election to terminate the entire labor relations contract, claiming that the strike afforded justification for such action. In argument before this court it was conceded on behalf of Boeing that this letter of termination effectively brought to an end all of the numerous obligations assumed by the parties under the labor relations contract."

The Court of Appeals in the concluding paragraph of its decision goes on further to comment on the rescission letter of April 22, 1948, as follows (R. 1349):

> "In the opinion of the district court, reported in 91 Fed. Supp. 596 the analysis of this decisive point appears at pages 609, et seq. under the heading "V. The legal effect of the Company's letter of April 22, 1948." That analysis is careful, comprehensive and, we think, correct. Restatement beyond this expression of approval would serve no useful purpose."

C. The concurrent decisions of the District Court and the Court of Appeals that the Boeing letter of April 22, 1948, constitutes a rescission and, therefore, a bar to this action are not in conflict with any applicable decisions of the Supreme Court of the State of Washington.

1. The decisions of the lower Courts involved an interpretation of the specific language of the letter of April 22, 1948, and are not in conflict, even in principle, with any decisions of the Supreme Court of the State of Washington.

The sole basis upon which Petitioner could seek review by this Court under sub-division V of Rule 38, Revised Rules of the Supreme Court of the United States, is a claimed conflict between the decisions of the District Court and the Court of Appeals with decisions of the Supreme Court of the State of Washington. An examination of the decisions of the two lower Courts, however, will disclose that they each involve principally an interpretation of the letter of April 22, 1948, and the opinion of the District Court involves an interpretation of the language and meaning of the Labor Relations Agreement between the parties. In essence these decisions are of the same character as findings of fact, and fall within the oft stated rule regarding review of concurrent factual findings.

S. S. Kresge Co. v. Sears, 87 Fed. (2d) 135; Certiorari denied 300 U. S. 670:

> "* * * The construction of written instruments is for the court and is determined by well settled rules of law, the purpose of which is to determine the intent of the parties, if not clearly expressed. (Citing authority.) But intent in the last analysis is a matter of fact."

In the comparative recent case of *National Labor Relations Board vs. Pittsburgh SS Co.,* 71 S.C. 453, this Court, speaking through Mr. Justice Frankfurter, said:

> "Certiorari is granted only 'in cases involving principles the settlement of which is of importance to the public as

> distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeal.' " (Citing cases.)

In the case of *Graver Tank and Mfg. Co. vs. Linde Air Products Co.*, 336 U. S. 271, this Court, speaking through Mr. Justice Jackson, said:

> "A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error."

See also *Alexander MacGregor vs. State Mutual Life Assurance Co.*, 315 U. S. 280; *General Talking Pictures Corporation vs. Western Electric Co.*, 304 U. S. 175; *Southern Power Co. vs. North Carolina Public Service Co.*, 263 U. S. 508; *Magnum Import Co. vs. Coty*, 262 U. S. 159; *Houston Oil Co. of Texas vs. Goodrich*, 245 U. S. 440; *Baker vs. Schofield*, 243 U. S. 114; and *Continental Paper Bag Co. vs. Eastern Paper Bag Co.*, 210 U. S. 405.

We respectfully submit that the circumstances in this case are far stronger than those in the case of *Spiegel's Estate vs. Commissioner of Internal Revenue*, 335 U. S. 701, where the majority of this Court, speaking through Mr. Justice Black, used the following language:

> "The questioned ruling was made by three judges who are constantly required to pass upon Illinois law questions. One of the three judges has long been a resident and lawyer of Illinois. Examination of the Illinois state court opinions pressed upon us leaves us unable to say with any

> degree of certainty that the Court of Appeals holding was wrong. It is certainly neither novel nor unreasonable for state law to provide that when all trust beneficiaries die the trust corpus should revert to the donor. It would be wholly unprofitable for us to analyze Illinois cases on the point here urged. It is sufficient for us to say that we think reasonable arguments can be made based on Illinois cases to support a determination of this question either for or against the petitioner's contention. Under these circumstances we will follow our general policy and leave undisturbed this Court of Appeals holding on a question of state law."

An examination of the Washington decisions cited by Petitioner to support its contention that there exists a conflict discloses that the cases cited do not conflict, even in principle, with the decisions of the District Court and the Court of Appeals.

The case of *Campbell vs. Hauser Lumber Co.*, 147 Wash. 140, cited at pages 9 and 19 of Petitioner's brief, involved a total repudiation of a contract in relation to the refusal to permit the Plaintiff to continue logging operations. In point of fact the question of rescission was never presented to the Washington Court in that case.

The case of *Dyer vs. Middle Kittitas Irrigation District*, 25 Wash. 80, cited at pages 9 and 19 of Petitioner's brief, involved a mutual rescission, and the Washington Court held that the contract had been rescinded.

The case of *Town of Castle Rock vs. Furth*, 78 Wash. 47, cited at pages 10, 25, 26 and 27 of Petitioner's brief actually involved a total abandonment and repudiation of the contract in question.

The case of *Boyer vs. City of Yakima*, 156 Wash. 518, cited at pages 10 and 27 of Petitioner's brief, also involved a total renunciation and repudiation of a contract. Both this case and the *Town of Castle Rock* case fell within the rule of *Lake Shore and M.S.R. Co. vs. Richards*, 152 Illinois 59, which Petitioner has cited in its brief. Neither case is in point with the case at bar.

At page 22 of its brief, Petitioner cites the case of *United States vs. Harris*, 100 F.2d 268, from the Court of Appeals in the Ninth Circuit in support of its theory that Boeing's right to sue for damages was not barred by the letter of April 22, 1948. An examination of the case cited, however, will disclose that the Court merely interpreted the letter of termination as not indicative of an intention to rescind. There was a total abandonment and repudiation of the contract and the two cases relied upon by the Court of Appeals as set forth in the quotation at page 22 of Petitioner's brief are completely in accord with Respondents' position in the case at bar. In each case, it is obvious that the Court would have found the contract to be rescinded in the absence of language negating that intention.

In the case of *P. J. Carlin Const. Co. vs. Guerini Stone Co.*, 241 F.545, cited by the Court of Appeals in the Harris case, there was involved a total breach and repudiation and the Court said:

> "The position is taken by the defendant that the plaintiff in its letter of May 22, 1912, terminated and rescinded the contract, and was thereby precluded from maintaining an action upon the special contract. In the letter the

> plaintiff states it terminates the contract, but it is apparent, from the rest of the language used, that the word 'terminate' was intended simply to convey the idea that the plaintiff declined to go on and complete the work, for it also says that it will hold the defendant responsible in damages for breach of the contract." (*Anvil Mining Co. vs. Humble*, 153 U.S. 540.)

The other case relied upon by the Court of Appeals in the Harris case was the case of *Moore vs. Beiseker*, 147 F.367. That case also involved a repudiation and the language of the Court is as follows. The Court first quotes from the Notice of Termination:

> " 'You are hereby notified that I rescind said contract and declare the same to be no longer in force'."

> This must be read and understood, however, in its connection; for it was followed up by saying:

> " 'And I hereby demand the payment to me of the $500.00 paid by me on said contract, and shall also hold you responsible for all damages sustained by me on account of your refusal to carry out and perform said contract.' "

> "From which it is evident that the words 'rescind' and 'no longer in force' were used in no other sense than to indicate that the contract was broken and at an end for the purpose of further dealings with the defendants; and that, therefore, the plaintiff would hold them liable for damages."

In the case of *Labor Hall Assn. Inc. vs. Danielsen*, 24 Wash. (2) 75, cited at page 30 of Petitioner's brief, the Court merely held that the two remedies therein sought were not in fact inconsistent and the Court actually affirmed the rule contended for by Respondents in this language:

> "It may be stated that as a general rule where one has available to him the choice of affirming a contract and suing for damages for an alleged breach thereof, or disaffirming the contract and bringing his action for rescission, the two remedies are inconsistent, and that a selection of one and proceeding thereunder is a bar to resorting to the other remedy."

The remaining Washington cases, cited by Petitioner at pages 11 and 31 of its brief, have no relation whatsoever to the case at bar. In each of these cases the Washington Court held that there had been no election by reason of the fact that one of the two remedies was not available. In this case Boeing could have brought suit for damages if it so desired predicated upon a material breach of the contract, or, in the alternative it had the option of rescinding the contract because of the breach thereof. Each remedy was available to Boeing and Boeing chose the remedy of rescission.

2. The decisions of the lower Courts are in harmony with a controlling decision of the Supreme Court of the State of Washington, interpreting identical language to that contained in Boeing's letter of April 22, 1948.

Not only does there exist no conflict, even in principle, between the decision of the District Court and the Court of Appeals with decisions of the Supreme Court of the State of Washington, but in fact the decision of the District Court, expressly adopted by the Court of Appeals, follows the only decision of the Supreme Court of the State of Washington wherein identical language to that contained in Boeing's letter of April 22, 1948, was interpreted by the Washington Court.

In referring to this case, *Beltnick vs. Tacoma Theatre Co.*, 61 Wash. 132, the District Court in its opinion and commencing at page 690 of the Record says as follows:

> "Under the well known rule of the Supreme Court of the *United States* established in the case of *Erie Railroad Co. vs. Harry J. Tompkins* (1937), 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A.L.R. 1487, a decision by the Supreme Court of the State of Washington upon a question of substantive law is binding upon this Court and determinative of any issue so decided. The Supreme Court of Washington has had before it a notice stating that an agreement was "terminated and at an end." In the case of *Beltnick vs. Tacoma Theatre Co.* (1910), 61 Wash. 132, 111 Pac. 1045, there was involved an action to recover damages for breach of a written contract. One of the defenses was that the defendant had effectively rescinded the contract because of a prior breach by plaintiff, and thus the question of rescission and the sufficiency of the notice thereof was squarely before the Court. The notice contained the following language:
>
> " 'You are hereby notified that because of your failure to keep and perform the terms, covenants and conditions * * * in that certain agreement * * * *the said undersigned does declare said agreement terminated and at an end.* You are requested to forthwith remove your advertising drop curtain from the premises of the undersigned, to-wit, The Tacoma Theatre, in the city of Tacoma, Washington, and forthwith pay to the undersigned all amounts now due from you to the undersigned to this date. You are further notified that unless you at once signify your intention to remove said curtain and do forthwith remove the same, that the undersigned will remove the same, and hold the same subject to your order.' " (Emphasis added.)

"The Washington Court throughout its opinion referred definitely to the rescission by defendant, and in affirming the judgment for defendant concluded its opinion in the following language:

> " 'Appellant had failed to pay in accordance with the terms of his contract, although frequent demands were made upon him. Respondents were not compelled to refuse defaulted payments in order that they might preserve their right to *rescind* the contract for appellant's breach. They accepted such payments, for which appellant received credit, but they protested against appellant's course of dealing and repeatedly threatened to remove the curtain. Appellant thereafter remained in default; whereupon they *rescinded*. This is not an instance where a *recission* was declared without previous demand or warning. If respondents, after repeated demands and warnings, could not *rescind* they would have been compelled to continue the curtain indefinitely, although appellant constantly remained in default. The contract imposed no such obligation.' " (Emphasis added.)

The interpretation placed by the Supreme Court of the State of Washington upon the language "terminated and at an end" in the *Beltnick* case has never been questioned or overruled in the State of Washington and that decision is today the law of that state.

D. The concurrent decisions of the District Court and the Court of Appeals are correct in finding and holding that the Boeing letter of April 22, 1948, was a letter of rescission and, therefore, a bar to this suit for damages.

When there has been a material breach of a contract, but

which does not amount to a repudiation or renunciation of the contract, the injured party may either (1) rescind the contract or (2) hold the contract as subsisting and sue for damages occurring thereunder. In a variety of situations the Washington Court has consistently followed this rule. See *Labor Hall Assn. vs. Danielsen*, 24 Wash. 2d. 75; *Willis T. Batcheller Inc. vs. Welden Construction Co.*, 9 Wash. 2d. 392; *Chavelle vs. Duclos*, 154 Wash. 492; *Blenz vs. Fogle*, 127 Wash. 224; *Dishman vs. Huetter*, 41 Wash. 626; *Houser and Haines Mfg. Co. vs. McKay*, 53 Wash. 337; *Johnson vs. Associated Oil Co.*, 170 Wash. 634; *Skoug vs. Hartford Accident and Indemnity Co.*, 124 Wash. 293; and *Kimble Motor Car Co. vs. Androw*, 125 Wash. 225.

The Agreement herein contained a clause in Article XI, Sec. A. 2, providing "* * * In the event that strikes * * * or any other form of work stoppage occurs, the parties agree to take corrective action with a view toward preventing a recurrence of such incident" (R. 115). This part of the contract was inserted by the parties to express their intentions with reference to work stoppages. It is evident that the parties did not intend that a strike would terminate or end the contract in view of the above quoted phrase.

It is unnecessary to cite a great number of authorities to the effect that a labor relations agreement continues notwithstanding a strike for otherwise there could be no remedy for injunction after and during a strike. That there is such a remedy is clearly shown by the cases collected in 95 A.L.R. commencing at page 46 and 156 A.L.R. commencing at page 652 with par-

ticular reference to that commencing at page 670. As an example of the cases cited therein, attention is called to the case of *Nevins, Inc. vs. Kasmach,* 279 N.Y. 323, 18 N.E. (2d) 294 reversing 252 Appellate Division 890, 300 N.Y.S. 64 where the Court held that the complaint stated a cause of action in equity and that the plaintiff rightly invoked the jurisdiction of equity to apply for an injunction. The complaint showed that the parties had entered into a collective bargaining agreement by the terms of which the amicable relations of the parties were to continue and there should be no strike or lockout but that the defendant union without cause and in violation of the contract had called a strike, the plaintiff asking for an injunction against the strike and for specific performance of the contract.

This rule that a strike does not terminate, renounce or repudiate the agreement is particularly applicable to the agreement involved herein because of the above quoted phrase in regard to corrective action. The contract, therefore, remained in effect notwithstanding the strike and was only terminated by the affirmative election of Boeing at 10:25 o'clock A.M. on April 22, 1948. The third alternative is not available to Petitioner because the strike did not repudiate, renounce or constitute an abandonment of the agreement.

The letter does not say by reason of this strike Boeing regards the agreement referred to above as terminated and at an end, but the letter does say, "By reason of this strike you are *hereby notified* that the agreement referred to above is terminated and at an end." The letter as written is a notification of action on

the part of Boeing and not an expression of an opinion on the part of Boeing.

The plain and clear meaning of Boeing's letter of April 22, 1948, was that of rescission.

The language of the letter of April 22, 1948, itself compels this conclusion. The letter does not purport to notify Lodge 751 that the Agreement is terminated by reason of the strike. On the contrary, the plain meaning of the language used (with advice of their counsel and after consultation by all) (R. 1020) was *by reason of this strike we are notifying you that we terminate the contract.* If Boeing had intended to advise Lodge 751 that the strike terminated the contract, it could have said so. The language it did use meant exactly what it said and was language of rescission.

VI.
CONCLUSION

The decisions below involve principally an interpretation of Boeing's letter of April 22, 1948. No conflict, even in principle, exists between these decisions and any decisions of the Supreme Court of the State of Washington and, in fact, the decisions of the Courts below follow exactly a decision of the Supreme Court of the State of Washington interpreting identical language to that contained in Boeing's letter of April 22, 1948. The decisions below were clearly correct.

We respectfully submit that the petition for certiorari be denied.

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No. 124

In the
Supreme Court of the United States
October Term, 1951

Boeing Airplane Company, a corporation, *Petitioner*,

vs.

Aeronautical Industrial District Lodge No. 751 of the International Association of Machinists, a labor organization; and International Association of Machinists, a labor organization, *Respondents*.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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No. 124

In the Supreme Court of the United States

OCTOBER TERM, 1951

BOEING AIRPLANE COMPANY, a corporation, *Petitioner*,

vs.

AERONAUTICAL INDUSTRIAL DISTRICT LODGE NO. 751 OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS, a labor organization; and INTERNATIONAL ASSOCIATION OF MACHINISTS, a labor organization, *Respondents*.

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

This is a reply brief and in it we shall endeavor to deal, as concisely as possible, with the specific matters in respondents' brief which seem in greatest need of correction.

As to the Conflict of Decision

In essence, respondents' brief concedes that if the strike can be regarded as a *repudiation* of the Agreement (rather than, as they contend, merely a *material breach* of it) then a conflict does exist between the decision of the lower court and decisions of the Supreme Court of the State of Washington.

But, state respondents, no such conflict can exist because the strike cannot possibly be regarded as a repudiation of the Agreement.

Assuming, arguendo, that a distinction exists between the remedies available to the innocent party in the event of a material breach as against those available in the event of a repudiation, the assertion that the strike was not in repudiation of the Agreement simply cannot survive scrutiny.

We can conceive of no better example of a repudiation than a strike which, as here, was in complete disregard of a no-strike provision, lasted for approximately five months, *and began immediately after a union ultimatum to the employer either to accede at once to a new agreement "or else."*

But respondents nevertheless continue to press the theory (which finds no support in any recognized principle of law) (a) that the innocent party to a contract can terminate and sue only where the contract is repudiated but not where it is materially breached, (b) that the word "terminated" must therefore necessarily be read as "rescinded" in the Boeing letter of April 22, 1948, because, they argue, Boeing did not have the right to terminate and sue, and (c) that in the absence of a repudiation no conflict exists between the lower court decision and the Washington decisions which admittedly recognize the right to terminate and sue where a repudiation has occurred.

Moreover, the Washington decisions make no such distinction between a material breach and a repudiation, and the fallacy of the argument that the word "terminated" must be read as "rescinded" becomes doubly apparent when it is remembered that, just prior to de-

livery of the letter, respondents were advised that the Agreement would be enforced and that, just after delivery of the letter, respondents were advised orally, and also by the prompt institution of this action, of Boeing's unvarying claim for damages for breach of the Agreement.

And again, the argument that the letter must be regarded not as a termination but as a rescission, on the basis of a Washington decision of 41 years ago (*Beltinck v. Tacoma Theater Co.*, 61 Wash. 132, 111 Pac. 1045 (1910)) discussed in petitioner's brief at page 30, in which the vital differences between the legal consequences flowing from a termination of a contract—as against those flowing from a rescission of it—were in no way involved or even considered by the Washington court, is completely without merit. Also, it ignores entirely the several later Washington cases mentioned in petitioner's brief (pages 19, 25 and 27) where these vital differences were considered and recognized by the Washington court to be as stated in petitioner's brief.

These basic fallacies underlie the whole of respondents' argument on the matter of conflict of decisions.

As to Review of Concurrent Findings of Lower Courts

Respondents rely heavily on the rule stated by this court in *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271 (1948) and other cases cited on page 9 of their brief to the effect that this court will

not undertake to review concurrent *findings of fact* by two courts below in the absence of a very obvious and exceptional showing of error. Such rule can have no possible application here. There are no findings of fact involved inasmuch as the parties have stipulated in writing (R. 637-638) that the legal effect of the letter, upon which this appeal turns, shall be determined solely as a matter of law. And even without such a stipulation, the result is the same because the construction and effect of a written instrument is a question of law. *Swift & Co. v. Hocking Valley R. Co.,* 243 U.S. 281, 289 (1917); *State v. Comer,* 176 Wash. 257, 266, 28 P.2d 1027, 1031 (1934); *Drainage District No. 1 v. Rude,* 21 F.2d 257, 262 (CA-8, 1927).

As to the Importance of the Question Presented

Respondents further urge this court to view the question involved as one devoid of general importance. On this, they argue that the question is so strictly limited to unique facts of record that it is unworthy of review.

A reference to the language of the lower court is alone sufficient to dispel any such notion. To quote the Court of Appeals (R. 1348):

> "The power of *termination* which accrues to the wronged party as a result of such a breach and was exercised by Boeing in this case *is* a right of *rescission* which leaves neither party with any basis thereafter to complain of the conduct of the other as a breach of the contract." (Italics added.)

It is thus the law of the lower court decision that where a collective bargaining agreement containing no-strike and union shop provisions is in full force and effect, and where that agreement is breached by a strike which constitutes a material breach of the agreement to the employer's great detriment, then the "power of termination" which accrues to the employer is a "right of rescission" which leaves neither party with any basis thereafter to complain of the conduct of the other.

This sweeping and drastic conclusion is in no way predicated on any unique facts of record.

In other words, according to the lower court, *any* employer faced with a breach of a no-strike provision, contained in a union shop collective bargaining agreement, can do one of two things, only: (1) continue full performance of employer's obligations under the agreement despite the continuing breach by the union, and then consider attempting to recover damages whenever the striking union decides to end the strike, or (2) terminate, *and thus automatically rescind,* the agreement. Boiled down, this means that *no* employer confronted with a strike in violation and repudiation of such a collective bargaining agreement, can lawfully attempt to activate the struck plant, free of union shop provisions and other obligations of the breached agreement, without forfeiting all right of action against the striking union for damages flowing from the breach.

It is inescapable that the question presented is one of great interest and concern to all employers and to all labor organizations and is clearly one of general and paramount importance.

The petition for writ of certiorari should be granted.

Respectfully submitted,

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